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No. 14-981

In the

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE ASIAN AMERICAN LEGAL FOUNDATION AND THE ASIAN AMERICAN COALITION FOR EDUCATION (REPRESENTING 117 AFFILIATED ASIAN AMERICAN ORGANIZATIONS) IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013).

2. Whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld the use of racial preferences in higher education admissions for the non-remedial, and amorphous purpose of "diversity," should be overruled as fundamentally incompatible with the Equal Protection Clause of the Fourteenth Amendment and the equality principle of the Declaration of Independence?

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INTEREST OF AMICI CURIAE[1]

The outcome of this case is of critical importance to *Amici Curiae* and their constituents, who are Americans of Asian ethnic origin. They and their constituents plead with this Court to recognize the long and sad history of discrimination against Asian Americans in America, and to ban continuing discrimination against the children of this historically oppressed group for any non-remedial purpose, including purportedly benign rationales such as race-determinant diversity and affirmative action.

The Asian American Legal Foundation ("AALF") was founded to protect and promote the civil rights of Asian Americans, in particular where, as here, Asian Americans are being discriminated against in the name of a purportedly benign purpose. Members of AALF were instrumental in the struggle to end discrimination against Chinese American students in the San Francisco, California public school system, discrimination that was also imposed for supposedly benign reasons. *See Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (1998). More information on AALF and its mission can be found on its website at http://www.asianamericanlegal.com.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The Asian American Coalition for Education ("AACE") is a non-political, non-profit, national organization devoted to promoting equal rights for Asian-Americans in education and education-related activities. The leaders of AACE and its supporting organizations are Asian American community leaders, business leaders and most importantly, parents. They are not professional "civil rights advocates," but were forced to become civil rights advocates to stop and prevent the discrimination against their children that the "professionals" ignore, downplay and facilitate. In May 2015, the founders of AACE united more than 60 Asian American organizations to file a complaint with Department of Justice and Department of Education regarding Harvard University's discriminatory practices against Asian American applicants. It was one of the largest joint actions ever taken by Asian American organizations in pursuit of equal education rights.

AACE represents some 117 affiliated Asian American organizations in this present amicus effort including: 1441 Manufacture-Home Residents Association; 80-20 Washington D.C. Area Chapter; Allstar Institute; American Chinese Women Culture Media Club; American Society of Engineers of Indian Origin-NCC; American Southern Californian Economic and Culture Association; Ancestor Worship Festival Overseas Chinese; Anhui Association of Texas; Asian American Coalition for Education (NY); Asian American Community Association; Asian Americans for Political Advancement; Asian Boy Equal Rights; Asian Leadership and Cultural Network; AsianAmericanVoters.org; Backbone Foundation; Boise Modern Chinese School; Boston Forward Foundation; Boston Fudan Aluminum Association;

Center for Asian Pacific Affairs; Chicago Fudan Alumni Association; China Youth Center; Chinese America Association of Orange County; Chinese American Equalization Association (HQH); Chinese American for Progress and Equality (CAPE); Chinese American Parent Association; Chinese Language Teacher Association- Florida Chapter; Chinese School of Orlando; Coalition of Asian-Americans for Civil Rights; Conejo Chinese Cultural Association; Dallas/Fort Worth Chinese Alliance; Dong Fang Chinese; Enspire School; Federal Asian Pacific American Council; First Han International Language School; Florida Acupuncture Association; Florida Fujianese Association of USA; Florida Shandong Fellowship Association; Global Organization of Indian Origin - Los Angeles Chapter; Golden Dragon Chinese Kung Fu and Cultural Institute; Great Neck Chinese Association; Hanlin Culture and Education Foundation; Health Foundation (TX); Hebei Association in Northern California; Henan Association in Northern California; Houston Chinese Alliance; Hua Yi Chinese School; Hunan Club of Houston; Idaho Chinese Organization; Impact Speaking Academy; India Association of San Antonio; Indo-US Chamber of Commerce of Northeast Florida; Jacksonville Chinese Association; Jiao Tong University Alumni Association-Seattle; Kentucky Chinese American Association; Kiddie Academy of Gontana; Legal Immigrant Association; Livingston Chinese Association; Long Island Chinese American Association; Long Island School of Chinese; Lung Kong Tin Yes Association; Memphis Chinese School; Millburn-Short Hills Chinese Association; National Asian American PAC Michigan chapter (80-20); National Asian American PAC FL; National Federation of Indian American Association;

NC Beijinger; Noble Tree Publishing Inc.; North America Career Express Association; North American Education and Culture; Northeast Chinese Association of Florida; Northern California Chinese Culture Athletic Federation; Northern California Hubei Association; Overseas Chinese Association of Miami; Pakistan Policy Institute; Pakistani American Volunteers; Ray Chinese School; San Antonio Chinese Alliance; San Diego Asian Americans For Equality; San Dong Association; Shandong Fellowship Association of South USA; Shandong Friendship Association of California; Shou Chu Organization; Silicon Valley Chinese Association Foundation; Silicon Valley Women Alliance; Sillicon Valley Foundation for Better Environment; Sino Professionals Association; South Florida Chinese Business Association; South Florida Sicuanren & Chongqingren Chinese Association; South Main Toastmaster; Southwest University of Finance and Economics American Aluminums; Spring Source Education Institute; Sunflower Learning Center; SV Huaren Performance and Arts Association; Taiwan Benevolent Association of Florida; Taoist Institute of TCM; TeeterPal Little Friends Parenting Community; Texas Guangdong Association; Texas Northeast Chinese Association; The Chinese Women's Club of Greater Miami; The Federation of Florida Chinese Association; The Korean Association of Greater Washington; The Orange Club; Thuy Lowe for Congress Campaign; Tianjin Commerce Association USA Inc.; Tianmu Education Foundation; U.S. China Chan Cultural Exchange Association; UBC (United for a Better Community); United Asian American for Activism; United Chinese Association of Utah; US California Henan Association; USTC Alumni Association of Greater New York;

USTC Alumni Association of Southern California; USTC Alumni Foundation; UT Austin PGE Chinese Alumni Association; Venus Chinese School; World Federation of Chinese Traders Alumni-South Florida Chapter; and the X3 Academy.

SUMMARY OF ARGUMENT

Amici are greatly distressed by and find offensive the decision of the Fifth Circuit Court of Appeals (the "Fifth Circuit") upholding the race-based admission program at the University of Texas at Austin ("UT" or the "University"). Contrary to that court's depiction of the issue as "white" versus "minority," in fact, it is Asian American students, the members of a historically oppressed minority, who comprise the group most harmed by the program.

The evidence and common sense demonstrate that the UT admission program at issue is nothing other than forbidden racial balancing or, even worse, potentially an effort by academic and political elites to curry favor with a powerful voting bloc. Under the Texas Ten Percent Plan, UT already had more Hispanic American students enrolled than Asian American students, but under the plan being challenged in this case, UT insisted on giving preferences to Hispanic applicants, while disfavoring Asian American applicants, demonstrating that the University was not striving for "diversity" but racial balance.

The present discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education. *See, e.g.*, Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 Asian L. J. 181, 207-208 (May 1998).

It is disheartening to see the same type of discriminatory program at UT today, where Asian Americans are still being classified by race and con-

sidered not as valuable as other Americans because of their race.

The recitation of Respondents and their *amici* of a noble purpose behind the UT program should be given no weight. State officials have *always* argued that their classification of individuals by race, and discriminatory programs, were justified by important governmental purposes, and even the most racist programs have found support with "experts," including ivory tower academics and even military leaders. Yet, our country's history has always, in the end, demonstrated that classification and discrimination by race was a mistake.

In case after case, the single historical truth that emerges is that the rights of Asian Americans—and of all Americans—have been vindicated only by strict application of the Fourteenth Amendment's protection of *individual* rights. That same rule is no less valid today, and it directly applies to the situation in Texas.

For all of these reasons, the Court should find the UT admission program to be unconstitutional. The Court should also revisit and overrule its holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003), to make clear that outside of narrowly tailored programs that provide remedies to specific and proven victims of race-based discrimination, race should not be used in college admissions or any other setting.

ARGUMENT

I. Asian Americans, a Minority Group Repeatedly Victimized by Discrimination, Are the Group Most Harmed by the University of Texas Admissions Program—A Fact Not Even Considered by the Fifth Circuit.

The Fifth Circuit approved the race-determinative UT admissions program, but in its analysis failed to consider the effect of the program on the group most negatively burdened—Asian Americans. For this reason alone, the decision is deeply flawed and should be reversed.[2] The Fifth Circuit erroneously described the issue as being "white" versus "minority," failing to consider that Asian Americans, members of an ethnic *minority* group, are the most harmed by the challenged program. The Fifth Circuit stated, "Given the test score gaps between minority and non-minority applicants, if holistic review was not designed to evaluate each individual's contributions to UT Austin's diversity, including those that stem from race, holistic admissions would approach an all-white enterprise." *Fisher v. Univ. of Tex. at Austin*, 758 F. 3d 633, 647 (5th Cir. 2014). If the Fifth Circuit's failure to recognize the burden of the UT program on Asian Americans was inadvertent, and based on mistaken belief that somehow Asian Americans are "white" and privi-

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[2] Contrary to this Court's instruction, *see Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2419 (2013), the court below, while pretending otherwise, once again failed to apply true strict scrutiny, deferring to UT officials' opinions as to the purpose of the admissions program, its necessity, and its effect on student applicants, and ignoring all evidence to the contrary.

leged, shame on that court. If the failure was purposeful, even more shame.

Contrary to the stated premise of the Fifth Circuit decision, white applicants do not have the highest average test scores; Asian Americans do. The court demonstrated an alarming ignorance of the reality of the multicultural and diverse society which it purports to advance, and a shocking lack of sensitivity to the identity and experience of Americans of Asian descent. In 2008, the student body at UT was 19% Asian American. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606, n. 10 (W.D. Tex. 2009). For Non-Top Ten Percent admittees, the SAT test score average for Asian Americans was 1346 versus 1300 for whites; Asian American applicants also had higher GPAs. *See Implementation and Results of the Texas Automatic Admissions Law: Demographic Analysis of Entering Freshmen, Report 12*, Tables 6a, 6c (UT Austin, Oct. 29, 2009).[3]

Therefore, it is Asian American applicants who suffered the greatest harm under race-determinant admissions policies.

The failure of the Fifth Circuit even to recognize that the burden of the challenged program falls disproportionately on Asian Americans, a minority group historically harmed by racial discrimination, demonstrates that its strict scrutiny analysis was seriously flawed and did not comport with this Court's clear requirements. *See Fisher*, 133 S.Ct. at 2419 ("Strict scrutiny is a searching examination");

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[3] Available at http://www.lb5.uscourts.gov/ArchivedURLs/Files/09-50822(2).pdf (last visited Sept. 8, 2015).

Adarand Constructors, Inc. v. Pena, 515 US 200, 227 (1995) (race classifications mandate "detailed judicial inquiry").

II. UT's Use of Race Deprives Asian Americans of the Right To Be Judged As Individuals and Not By the Color of Their Skin.

A. UT's racial preference scheme has an invidious effect on Asian Americans, whom UT apparently considers inferior to other races in achieving its skin-deep "diversity" objectives.

As this Court has repeatedly declared, "it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Thus, even if UT's race-conscious admissions program were truly necessary, which it is not, it would still demean Asian American individuals who are discriminated against by the scheme. The harm would simply be viewed as a necessary evil—the breaking of a few innocent eggs to achieve the purported greater good. Going further, however, the arguments UT and its supporters proffer to justify the program insult and demean Asian Americans. UT says its program is necessary to promote diversity and achieve a "critical mass" of minority student groups. However, under the challenged program, Hispanic applicants are given preference because of their race but applicants of Asian ancestry are discriminated against, despite the fact that "the gross number of Hispanic students attending UT exceeds

the gross number of Asian-American students attending UT." *Fisher*, 645 F.Supp. 2d at 606.

The finding of the Fifth Circuit that Hispanics are insufficiently represented even though present in larger numbers than Asian Americans means either: (1) that court was wrong and there is a critical mass of both; or (2) Asian Americans are not worth as much as Hispanics in promoting "cross-racial understanding," breaking down "racial stereotypes," and enabling students to "better understand persons of different races." *Grutter*, 539 U.S. at 329. The latter dubious proposition is unsupported by anything in the record. It is also racist.

B. Racial balancing for its own sake attempts to mirror Texas demographics to appease political power blocs.

The fact that UT already enrolls a greater number of Hispanic Americans than Asian Americans establishes that the admission program's true purpose cannot be the achievement of a "critical mass" of Hispanic students. UT's true goal is racial balancing—that is, making the student body mirror the racial composition of the State of Texas.

In 2008, the University's student body was 20% Hispanics and 19% Asian American; however, those groups respectively represented 36% and 3.4% of the Texas population. *Fisher*, 645 F.Supp. 2d at 606 and n.10. In its 2004 proposal that led to the race-conscious program at issue, the University admitted its desire to mirror the state's racial demographics: "[S]ignificant differences between the racial and eth-

nic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." *Proposal to Consider Race and Ethnicity in Admissions* at 24, June 25, 2004. *See* Parties' Supplemental Joint Appendix ("SJA"), 24a.

The University's goal of racial balancing is patently unconstitutional. "We have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake.'" *Parents Inv. In Comm. Sch. v. Seattle School No. 1*, 127 S.Ct. 2738, 2757 (2007) (citing cases).

III. For Much of America's History, Race-Based Governmental Programs Have Been Used To Oppress Asian Americans.

A. Repeatedly, federal court action was necessary to compel local government bodies to treat Asian Americans as human beings.

The UT discrimination against Asian Americans is particularly disheartening given the long history of similar governmental programs and policies used to oppress Asian American citizens of this great nation. Whether malevolent in intent or facially benign, these historical acts of governmental discrimination were always, like the UT program at issue here, considered or claimed to be in the public interest by the government officials who enacted them.

Throughout their history in this country, Asian Americans have faced barriers and discrimination because of their race. *See, e.g.*, Charles McClain, *In*

Search of Equality (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, The Unimpressible Race (East/West Publishing Co. 1982). Their treatment was so dismal it gave rise to the expression "a Chinaman's Chance," a term meaning "having little or no chance of succeeding." News Watch Diversity Style Guide, *at* http://www.ciij.org/publications_media/20111205-95034.pdf (last visited Aug. 3, 2015).

In just one example of the historical sentiment, in *People v. Hall*, 4 Cal. 399, 404-05 (1854), the California Supreme Court, invalidating the testimony of Chinese American witnesses to a murder, explained that Chinese were "a distinct people ... whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference."

Time and time again, Asian Americans have had to appeal to the federal courts for vindication of their rights under the Fourteenth Amendment to the United States Constitution. Over the past century and a half, these cases have contributed significantly to the development of equal protection jurisprudence.

In *Ho Ah Kow v. Nunan*, 12 F. Cal. 252 (C.C.D. Cal. 1879) (No. 6,546), a district court invalidated San Francisco's infamous "Queue Ordinance" on equal protection grounds.

In *In re Ah Chong*, 2 F. 733 (C.C.D. Cal.1880), the court found unlawful an act forbidding Chinese Americans from fishing in California waters.

In *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880), the court declared unconstitutional a provision of California's 1879 constitution that forbade corporations and municipalities from hiring Chinese.

In 1882, in an extraordinary and shameful attack on equal protection, Congress passed the Chinese Exclusion Act, the first national law enacted to prevent an ethnic group from immigrating to the United States. *See Chinese Immigration and the Chinese Exclusion Acts, at* https://history.state.gov/milestones/1866-1898/chinese-immigration (last visited Sept. 7, 2015). Fueled by anti-Chinese hysteria and supported by a broad spectrum of leaders and society of the time, it prohibited all entry of Chinese laborers. *Id.* The Act was not repealed until 1943. *Id.* As aptly described by opponent Republican Senator George Frisbie Hoar in 1882, this Act was "nothing less than the legalization of racial discrimination." *Id.*

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court ruled that Chinese were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance.

In *In re Lee Sing*, 43 F. 359 (C.C.D. Cal. 1890), the court found unconstitutional the "Bingham Ordinance," which mandated residential segregation of Chinese Americans.

In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), this Court ruled that a Chinese American

boy, born in San Francisco to parents of Chinese descent who were lawfully domiciled in the United States, could not be prevented by local officials from returning home after a trip abroad.

One of the most egregious modern infringements of the constitutional rights of Asian Americans occurred during World War II when, pursuant to presidential and military orders and supported by the statements of "experts," entire families of Japanese Americans were removed from their West Coast homes and placed in internment camps.[4] Now, of course, it is universally acknowledged that there was no justification for this abrogation of the rights of American citizens. *See Korematsu*, 584 F.Supp. at 1420; *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

The lesson taught, time and again, is that, in cases such as the one before it now, this Court should be extremely wary of the statements of the government officials and luminaries who line up to support a pro-

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[4] Executive Order No. 9066 was issued on February 19, 1942. It authorized the Secretary of War and certain military commanders "to prescribe military areas from which any persons may be excluded as protection against espionage and sabotage." Congress enacted § 97a of Title 18 of the United States Code, making it a crime for anyone to remain in restricted zones in violation of such orders. Military commanders then, under color of Executive Order No. 9066, issued proclamations excluding Japanese Americans from West Coast areas, and sending them to internment camps. *See Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984). History suggests that military commanders of any given era, regardless of their personal qualities and abilities in planning and waging war, should not be considered experts about whether or not race should or can be used to treat individual Americans differently.

gram of racial discrimination. Such proffered justifications for the infringement of individual rights have never stood the test of time.

B. Historical Discrimination Against Asian Americans in Education

As this Court has recognized, discrimination against Asian American schoolchildren has a long and shameful history, beginning with outright exclusion, then tracking the evolution of the "separate but equal" doctrine as applied to education, and finally evolving into racial balancing schemes such as the one at issue here.

In *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl who was denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian" children. *See McClain, supra,* at 137. In response, the California legislature authorized separate "Chinese" schools to which Chinese American schoolchildren were restricted by law until well into the twentieth century. See *Ho*, 147 F.3d at 864; *see also Kuo, supra*, at 207-208.

Asian American schoolchildren were some of the earliest victims of "separate but equal" jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the "Chinese" school in Chinatown was "separate but equal." *Id.* at 382.

In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine

articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl in Mississippi could be denied entry to a "white" school because she was of the "yellow" race. *Rice* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry . . . was the classic case of de jure segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]...." *Id.* at 1216. "*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco." *Lee*, 404 U.S. at 1216 (emphasis added).

IV. Today, Supposedly Benign Racial Balancing and Diversity Policies Insidiously Discriminate Against Asian American Students Nationwide.

A. The *Ho* Case – Modern Day Discrimination in San Francisco.

Unfortunately, efforts to discriminate against Asian American students did not end with *Brown v. Board of Education*. Today, schools at all levels are using supposedly "benign" racial balancing or diversity programs to discriminate against Asian American applicants solely because of their ethnicity.

Ironically, the most striking modern-day example of such "good-intentioned" discrimination against Asian American students occurred in San Francisco, California—in the state where much of the historical

discrimination against Asian Americans took place. The case provides useful lessons, both in terms of the skepticism that should be given purported justifications for the use of race and also in the adverse impact on the community and affected individual students and families.

In *Ho v. San Francisco Unified School District*, filed in 1994, San Francisco's Chinese American schoolchildren fought a five-year battle to halt the school district's policy of assigning them to the city's K-12 schools on the basis of their race. *See Ho*, 147 F.3d 854; *Ho v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999) (on remand); *Ho v. San Francisco Unified Sch. Dist.*, 965 F.Supp. 1316 (1997) (decision giving rise to appeal in 147 F.3d 854). *Amicus curiae* AALF was founded to organize the *Ho* litigation after all other efforts to achieve equality failed.

In *Ho*, the plaintiff class challenged a consent-decree-mandated racial balancing scheme imposed in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F.Supp. 34 (N.D. Cal. 1983). Without any finding of a constitutional violation to remedy, school officials set up a racial balancing scheme with the stated goals of preventing "racial isolation" and providing "academic excellence." *See Ho*, 965 F.Supp. at 1322; *see also Ho*, 147 F.3d at 859; *San Francisco NAACP*, 576 F.Supp. at 40-42, 58. Filled with zeal for their vision of racial engineering, the proponents ignored that the San Francisco school district was already and naturally one of the most ethnically diverse in the nation.

Under San Francisco's admissions program, nine ethnic groups (later enlarged to thirteen) were

arbitrarily defined, including "Chinese"; and "caps" were imposed to insure that no one group would represent more than 45 percent of the student body at any regular school or 40 percent at an alternative school. *See id.; see also Ho,* 147 F.3d at 856-58. As they were the largest racially identifiable group in the city, the burden of the system of quotas and caps fell heaviest on students identified as "Chinese," who were often unable to gain entrance to their own neighborhood schools or to desirable magnet schools. *See* David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer,* at 55-56, 16 Harv. BlackLetter J. 39 (Spring 2000).

Also, making matters worse at some schools, the district adopted a policy of granting preferences to applicants classified as "Hispanic" or "African American," *See Ho,* 147 F.3d at 858.

The named plaintiffs' stories amply illustrate the discrimination:

• Brian Ho was five years old. He was turned away from his two neighborhood kindergartens because the schools were "capped out" for "Chinese" schoolchildren. He was assigned to a school in another neighborhood. *See Levine, supra,* at 61.

• Patrick Wong, then fourteen years old, applied for admission to Lowell High School, a selective magnet school. He was rejected because his index score was below the minimum required for "Chinese" applicants, even though the score would have gained admission had he been a member of any other ethnic group. He was then rejected at three other high

schools because such schools were "capped out" for "Chinese." *Id.*

• Hillary Chen, then eight years old, was not allowed to attend any of three elementary schools near her home because all three schools were "capped out" for "Chinese" schoolchildren. *Id.*

As this Court warned in *Richmond v. Croson*, 488 U.S. 469 (1989), San Francisco schoolchildren were stigmatized by the district's use of race. *See Croson* at 493 (use of race promotes feelings of "racial inferiority" and "racial hostility"). As stated by the parent of one student turned away because of his ethnicity, "He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?" Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, at C-2 (Feb. 14, 1999).

As Lee Cheng, Secretary of AALF, testified in hearings held by the U.S. House of Representatives, Sub-Committee on the Constitution:

> Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

Group Preferences and the Law, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), p. 241, *at* http://www.archive.org/stream/grouppreferences00unit/grouppreferences00unit_djvu.txt (last visited Sept. 1, 2015).

Another insidious byproduct of San Francisco's racial balancing plan was "rampant dishonesty" by parents of all races who misreported children's racial identity to gain admission to desired schools. (This behavior perhaps can be more fairly characterized as civil disobedience against injustice.) *See* Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, at 1A (June 5, 1995). "[S]ome black families in Bayview-Hunter's Point have gone so far as to take Hispanic surnames to protect their children from busing." *Id.* at 10A. "People know if they want to go to a particular school that has a lot of Caucasians, they should put down something other than Caucasian, and they do." *Id.* at 10A (quoting then School Board President Dan Kelly).[5]

After five years of vigorous litigation, and after the district court and the Ninth Circuit Court of Appeals had emphasized to defendants that under the strict scrutiny standards set by this Court, they would lose at trial, the SFUSD agreed to cease its use of race in admissions. *See Ho*, 59 F.Supp. 2d at 1024-25.

B. Continuing Legislative Battles in California Over Use of Race in Education.

Based on their experience with the San Francisco school district in the *Ho* case, founding members of AALF also worked to pass Proposition 209, a California voter initiative that added Article I Section 31 to the State Constitution. Section 31 provides, "The State shall not discriminate against, or grant prefer-

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[5] The school enrollment forms threatened parents with "perjury" if they misreported the race of their child. *See Ho*, 147 F.3d at 862.

ential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. Art. I § 31(a). This provision forbids all state schools and universities from considering race in admissions.

Both the remedy secured in *Ho* and the prohibition on use of race of Section 31 remain under attack by proponents of racial engineering. San Francisco school officials who favor use of race raise the possibility of reinstituting race-based admissions every time a new Supreme Court case surfaces that might offer them support. *See e.g.*, Bob Egelko, Heather Knight, SCHOOLS, Justices Take Cases On Race-Based Enrollment, San Francisco Chronicle, at B-1 (June 6, 2006) ("If the Supreme Court upholds the Seattle system ... Prop. 209 is a moot point... Federal laws would override a state initiative." (quoting then board member Mark Sanchez).)

In 2014, California's citizens of Asian descent were forced to mobilize to defeat yet another attempt to re-introduce racial preferences in education. On January 30, 2014, the California State Senate passed California Senate Constitutional Amendment No.5 ("SCA-5"). *See* http://leginfo.legislature.ca.gov/ faces/billTextClient.xhtml?bill_id=201320140SCA5 (last visited Sept. 8, 2015). This proposition, if enacted, would have amended the California Constitution to allow the use of race in public education and would have removed schools and universities from the ambit of Section 31. *Id.* Asian Americans, including constituents of AALF, and AACE and its supporting organizations campaigned vigorously against the measure, gathering more than 112,000 signatures in

a matter of weeks. Dan Walters, "Asian-Americans opposing undoing Prop. 209," San Diego Union Tribune (March 14, 2014).

After SCA-5 was sent by the Assembly back to the Senate, several key senators who had backed the measure bowed to the unexpected groundswell of opposition and withdrew their support, asking that the bill be placed on hold. At their request, State Senator Ed Hernandez, the author of SCA-5, withdrew the bill from consideration on March 17, 2014. *See* Kate Murphy, *California Affirmative Action Revival Bill Is Dead* (San Jose Mercury News, March 18, 2014) *at* http://www.mercurynews.com/education/ci_25361339/california-affirmative-action-challenge-is-dead? (last visited August 30, 2015). The slightest relaxation of vigilance, however, is likely to see this bill revived. "'I'd like to bring it back,' Hernandez said. 'I believe in it.'" *Id.* Asian American victims of discrimination ask that this Court not embolden Senator Hernandez and his allies to do that.

C. Are Asian Americans the New Jews?

In an eerie historical parallel, Asian American applicants to elite colleges and universities today apparently face the same informal quotas faced by Jews who applied to Harvard College and other prestigious institutions during the first half of the 20th century. Beginning in the 1920s, Harvard College and other prominent colleges and universities reacted to the perceived "over-representation" of Jews in their student bodies by setting up quotas for applicants of the Jewish faith that persisted through the 1950s. *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 Brook.

L. Rev. 71, 111-12 (Spring 2000); Alan M. Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385-399 (1979); Nathan Glazer, *Diversity Dilemma*, The New Republic (June 22, 1998). "In the 1930s, it was easier for a Jew to enter medical school in Mussolini's Italy than in Roosevelt's America." Lawrence Siskind, *Racial Quotas Didn't Work in SF Schools*, op-ed, San Francisco Examiner (July 6, 1994).[6]

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[6] The arguments supporting the historical and modern-day racial balancing schemes are virtually identical. "President Lowell of Harvard called [the Jewish quota] a 'benign' cap, which would help the University get beyond race." Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin's Defense Of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 36 (Winter 1996). In the *Ho* case, proponents argued: "[T]he Chinese are the largest group at most of the best schools in the city. They can't have it all. If anything, I'd say lower the caps, don't raise them—otherwise we're headed back to segregated schools, only all Chinese instead of all white." Selana Dong, *"Too Many Asians": Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 Stan. L. Rev. 1027, 1057 n.36 (May 1995) (citation omitted) (quoting Lulann McGriff, former president of San Francisco NAACP); *see also* Levine, *supra*, at 138. And, today, the same arguments are used to justify turning away Asian American individuals from the nation's universities. *See* Glazer, *supra*; Dong, *supra*, at 1057, nn.4-5; Leo Rennert, *President Embraces Minority Programs*, Sacramento Bee (Metro Final) at A1 (April 7, 1995) (reporting that former President Clinton said that without race-based admissions "there are universities in California that could fill their entire freshman classes with nothing but Asian Americans"). "Today's 'damned curve raisers' are Asian Americans ...." Kang, *supra*, at 47 n.189 (cites and internal quotation marks omitted). Again, quotas promoting "diversity" are seen as the answer. *See* Pat K. Chew, *Asian Ameri-*

Since the 1920s, things have come full circle but this time with Asian Americans as the target. On May 15, 2015, *Amicus Curiae* AACE, representing a coalition of more than 60 Asian American organizations, filed a complaint with the Office for Civil Rights, Department of Education and the Civil Rights Division, Department of Justice, alleging that Harvard College, as it once did with Jewish applicants, now imposes *de facto* quotas for Asian Americans. *See* http://www.asianamericancoalition.org/files/harvard/AisanComplaintHarvardDocumentFinal.pdf (last visited Sept. 7, 2015). As reported May 19, 2015 in the *Wall Street Journal*, "Citing several academic studies, the complaint notes that Asian Americans have some of the highest academic credentials but the lowest acceptance rates at the nation's top schools, a result that the coalition attributes to 'just-for-Asians admissions standards that impose unfair and illegal burdens on Asian-American college applicants.'" Jason P. Riley, *The New Jews of Harvard Admissions* (*Wall Street Journal*, May 19, 2015).

The AACE complaint highlights compelling evidence that Harvard and other elite colleges discriminate against undergraduate Asian American applicants to maintain their informal quotas.

An extensive study of the admission process at prestigious colleges by Daniel Golden, Pulitzer Prize-winning *Wall Street Journal* reporter, found widespread discrimination against Asian American applicants. *See* Daniel Golden, *The Price of Admission:*

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cans: The "Reticent" Minority and Their Paradoxes, 36 Wm. & Mary L. Rev. 1, 61-64 (Oct. 1994).

How America's Ruling Class Buys Its Way into Elite Colleges—and Who Gets Left Outside, Chapter 7: The New Jews (Three Rivers Press, 2007); AACE Complaint at 11-12. According to Golden's quantitative analysis, Harvard and other elite schools use methods including negative stereotypes, such as "being quiet," "focusing on math and science," and "play[ing] a music instrument" to downgrade Asian American applicants in holistic reviews. He concludes that most elite universities maintain a triple standard in college admissions, setting the bar highest for Asian Americans, next for whites and lowest for blacks and Hispanics. *Id.*

As reported in their 2009 book, *No Longer Separate, Not Yet Equal*, Princeton researchers Thomas J. Espenshade and Alexandra Radford examined exhaustive application data from three elite public and four elite private colleges and found that Asian American applicants have 67% lower odds of admission than white applicants with comparable test scores. AACE Complaint at 12. "They found that when applying to top private universities an Asian-American student has to score 140 points higher than a White student, 270 points higher than a Hispanic student and 450 points higher than a Black student on the SAT to be on equal footing.[7] Put another way, if a top private university such as Harvard accepts white students with an SAT mean score of 2160, its mean score for accepting Asian-American

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[7] Illustrating the absurd nature of the discrimination, a mixed race applicant of both Asian and white descent would obtain a 140 point advantage (over "Asian" applicants) simply by checking the "white" box on the application.

students would be 2300, 140 additional points." *Id.* at 13.

The complaint cites similar findings by researcher Ron Unz. *See* Ron Unz, *The Myth of American Meritocracy: How Corrupt are Ivy League Admissions?*, pgs. 14-51 (The American Conservative, Dec. 2012), *at* http://www.theamericanconservative.com/artcles/the-myth-of-american-meritocracy/ (last visited Sept. 6, 2015); AACE Complaint at 13. Comparing population growth of college-age Asian Americans, the Asian American enrollment of Harvard and other Ivy League Colleges, Unz found, "the share of Asians at Harvard peaked at over 20 percent in 1993, then immediately declined and thereafter remained roughly constant at a level 3–5 points lower." *Id.* He found this particularly suspicious considering that the underlying population of Asian Americans had throughout this period been growing at the fastest pace of any American racial group, increasing by almost 50 percent during the last decade and more than doubling since 1993. *Id.* At the same time that Asian American academic achievement was shooting upward, "the relative enrollment of Asians at Harvard was plummeting, dropping by over half during the last twenty years, with a range of similar declines also occurring at Yale, Cornell, and most other Ivy League universities." *Id.*

As history shows, such artificial attempts to mandate a racially balanced student body invariably mean discrimination. *See* Dershowitz & Hanft, *supra*, at 399 ("Both then and now ... such unlimited discretion makes it possible to target a specific religious or racial group—then for decrease, and now for increase ...."). In *Brown v. Board of Education*, 347

U.S. 483, this Court recognized the inherent injury when schools assigned students on the basis of race, whatever the stated purpose. That same reasoning should apply today.

Certainly, to the extent that individual students of some ethnic groups are found to be underrepresented, local governments may take measures to bring about meaningful change, such as improving K-12 education in disadvantaged communities, supplemented with reasonable affirmative action programs that use race-neutral criteria such as socio-economic factors and other constitutionally-permissible means. However, other than as a remedy for *de jure* discrimination, it is a mistake to allow schools to grant racial preferences to individuals of favored groups or to single individuals of disfavored groups out for unfair burden—something that always demeans the individual while never achieving lasting change.

V. The Fifth Circuit Erred In Not Recognizing That The Top Ten Percent Plan Had Already Achieved A "Critical Mass."

"[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Fisher*, 133 S.Ct. at 2420. Here, there was no need to use racial classifications because under Texas' Top Ten Percent Plan, the University had already achieved a critical mass

of minority students.[8] *See* Tex. Educ. Code § 51.803 (1997).

The Top Ten Percent Plan is the result of a Hispanic American summit that took place in 1996:

> At a "Hispanic Summit on Affirmative Action Policies" organized by Senator Barrientos on September 6, 1996, two plans to enhance campus diversity were introduced which would eventually be combined to form the Texas Ten Percent Plan.

See Nicholas Webster, *Democratic Merit Project, Analysis of the Texas Ten Percent Plan* (Kirwan Institute for the Study of Race and Ethnicity, Feb. 8, 2007) at 4.

By the time of Fisher's application to UT, the Top Ten Percent Plan had ensured significant minority enrollment in Texas' top universities, including UT. In 2004, the combined African-American and Hispanic enrollment at UT was 21.4% (African-American 4.5% and Hispanic 16.9%), and the total non-white population rose to nearly 43% of the incoming freshman class. *See* Plaintiff's Statement of Facts in Support of Motion for Partial Summary Judgment (Doc. 94-2) at 13 (W.D. Tex. Jan. 23, 2009); Petition Appendix ("App."), 166a.

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[8] *Amici* AALF and AACE do not necessarily support the Top Ten Percent Plan, largely because while race-neutral in form, it was created and implemented specifically to achieve racialist results. Rather, they note that it had undoubtedly already achieved the critical mass of targeted minorities the University says it desired in a clearly more narrowly tailored, less constitutionally suspect manner.

These substantial levels of minority enrollment show that the Top Ten Percent Plan had already achieved "critical mass" of minority representation at UT—without the need for the program at issue here. The critical mass exceeded that approved at the University of Michigan Law School in *Grutter*. *See Grutter*, 539 U.S. at 329; *Fisher*, 758 F. 3d at 656 (J. Garza, dissenting).

UT insults African and Hispanic American students admitted through the Top Ten Percent Plan by pretending that diversity requires minority students from majority-white schools. *See Fisher*, 758 F. 3d. at 653. Nothing in equal protection jurisprudence supports such a "diversity within diversity" justification for use of race, especially not one that, as here, was fabricated during the course of the litigation.[9]

Clearly, the evidence is overwhelming that the Top Ten Percent Plan had already achieved a critical mass of minority students, leaving no legal basis for a race-conscious admission program, especially one causing harm to Asian Americans, a historically disadvantaged minority group. With the "ultimate burden" on UT to show otherwise, *Fisher*, 133 S.Ct. at 2420, the University utterly failed to carry its burden.

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[9] As Justice Garza aptly point out in his dissent, "[T]he University asks this Court to assume that minorities admitted under the Top Ten Percent Law do not demonstrate "diversity within diversity" . . . But it offers no evidence in the record to prove this, and we must therefore refuse to make this assumption. *Fisher*, 758 F. 3d. at 670.

VI. It Has Historically Been A Mistake To Defer To The Opinions Of Officials, Experts and Other Luminaries Who Support Racial Classifications

All of the historical cases in which officials, experts and other luminaries supported the use of race for non-remedial purposes teach that it was a mistake to give weight to their blandishments.

In *Plessey v. Ferguson,* 163 U.S. 537 (1896), this Court accepted the view that, even though all persons are equal before the law, the public good allowed the use of "distinctions based upon color." The lone dissenter, Justice John Harlan, wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.... In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case ...." *Id.* at 558. History proved Justice Harlan to be right.

In *Brown v. Board of Education,* 347 U.S. 483, this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia and South Carolina that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate. Expressly rejecting any contrary findings regarding "psychological knowledge" made in *Plessey v. Ferguson,* the Court found that use of race produces a "sense of inferiority." "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place." *Brown,* at 494-495.

Today, it is universally acknowledged that the Roosevelt administration and military authorities

infringed the constitutional rights of Japanese Americans when, during World War II, the government placed entire families under curfew, then removed them from their West Coast homes and placed them in internment camps. Yet, at the time, the courts deferred to opinions by administration and military officials that such use of race was necessary in the national interest.

In *Hirabayashi v. United States*, 320 U.S. 81, this Court affirmed the conviction of an American citizen found guilty of violating the curfews imposed on Japanese Americans. In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court upheld the conviction of an American citizen of Japanese descent, who had violated an exclusion order by remaining in his San Leandro, California home, rather than report for incarceration in an internment camp. The courts at all levels deferred to declarations by officials and military authorities that such discrimination by race was necessary to advance compelling government interests. *Id.* 217-219.[10] Amicus briefs submitted by the states of Oregon, Washington and California, urged and supported the discrimination. *See Korematsu v. United States*, 583 F. Supp 1406, 1423 (N.D. Cal. 1984).

Much later, of course, it was acknowledged that this Court should not have deferred to the self-serving statements by government and military officials; and that there had never been a national ne-

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[10] "It was uncontroverted at the time of conviction that [Fred Korematsu] was loyal to the United States and had no dual allegiance to Japan. He had never left the United States. He was registered for the draft and willing to bear arms for the United States."*Korematsu*, 584 F. Supp. at 1409.

cessity requiring the use of race. *See Korematsu*, 584 F.Supp. at 1420; *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). The 1980 Commission on Wartime Relocation and Internment of Civilians found that the curfew and exclusion orders had been motivated by "racism" and "hysteria" and not "military necessity." *See Korematsu*, 584 F.Supp. at 1416. "[T]he government deliberately omitted relevant information and provided misleading information in papers before the court." *Id.* at 1420.

In the *Ho* case, the district court had deferred throughout to the statements of experts, overriding the expressed concerns of parents. The court even rejected the appeals of black parents from the Bayview/Hunter's Point neighborhoods, who argued that the racial balancing plan would destroy neighborhood schools where they took "pride in the academic achievements" of their children. *See San Francisco NAACP*, 576 F.Supp. at 49. The court acknowledged "that the children at Drew School and Pelton School to some extent are being asked to make sacrifices," but explained that pedagogical experts had concluded the "desegregation" benefits would ultimately make their sacrifices worthwhile. *Id.*

In fact, by the time the *Ho* plaintiffs forced the end of the racial balancing scheme, even proponents were forced to admit that nothing had been accomplished other than racial balancing. "Fourteen years of experience with the Consent Decree have established that while it has met its goal of *de facto* desegregation, it has been a failure at accomplishing its primary purpose of achieving academic excellence for all ethnic groups." *See* Grand Jury Report, *The San Francisco Unified School District, at*

http://civilgrandjury.sfgov.org/1996_1997/The_San_Francisco_Unified_School_District_9697.pdf (last visited Sept. 8, 2015) (San Francisco Civil Grand Jury Report, 1996-97). The Grand Jury in particular found that racial balancing had not worked for Hispanic and African American students, whose academic scores were "lower than those of comparable students around the country ..." *Id.* at IV. And, only one of San Francisco's schools, the magnet Lowell High School (the alma mater of the majority of the founders of *amicus curiae* AALF), still had meaningful parental involvement. *Id.* n.12.

Referring to the *Hirabayashi* and *Korematsu* cases, Justice Powell wrote, "Only two of this Court's modern cases have held the use of racial classifications to be constitutional."*Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring).[11] Ironically, those two cases were later joined by a third--*Grutter v. Bollinger*, 539 U.S. 306 (2003)--where "[t]he Court also heeded the judgment of amici curiae—including educators, business leaders and the

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[11] Justice Powell's statement in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that in certain hypothetical circumstances diversity could rise to a compelling government interest does not constitute a third prior holding supporting race by this Court. As the University of California Medical School admission program then at issue was found unconstitutional, his statement was dicta expressed in an opinion ascribed to only by Justice Powell. *See* 438 U.S. at 272, 320. It is also interesting to note that Justice Powell's dicta expressly lauded Harvard College's "soft" diversity-discretion model of affirmative action as constitutionally preferable to the strict, "hard" quota system utilized by the University of California, failing to consider that the Harvard Plan had anti-Semitic roots, being designed to restrict enrollment of Jewish students. Kang, *supra*, at 36.

military—that racial diversity constituted a compelling government interest justifying the use of race in admissions." *See Parents Inv. In Comm. Sch. v. Seattle School No. 1*, 426 F.3d 1162, n.13; *Grutter*, 539 U.S. at 330-331.

Once again, officials and experts support the use of race, arguing that UT's use of race in admissions was somehow needed to advance a compelling interest in diversity--while ignoring the clear evidence that, not only had Texas' Top Ten Percent Plan already provided the sought-after diversity but that the UT program actually limited the diversity that would otherwise be provided by Asian American students, who were less well represented in the student body than Hispanic students, one of the groups granted preferences.

If this Court wishes to learn from negative history, rather than repeating it, it should reject the poorly-advised or self-serving statements of the experts and luminaries who, once again, support the use of race to infringe individual rights.

VII. This Court Should Re-Establish The Bright-Line Rule Reserving Use of Race For Remedial Settings.

That this case is before this Court for the second time illustrates the danger of allowing race-based college admissions for any purpose other than to provide a remedy for previous *de jure* discrimination. Diversity is "simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications...." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting). As this case amply shows, if they are

allowed to use diversity as the justification, it is all too easy for school officials to justify any race balancing program by concocting (here, mostly after the fact) ambiguous and ill-defined pedagogical goals, backed by the self-serving statements of state officials and their allied experts.

Until *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court's jurisprudence taught that the Fourteenth Amendment's stricture on the state's use of race was absolute, except where such action was necessary to further the compelling government interest of vindicating the rights of individuals who had been subjected to prior racial discrimination. As this Court warned in *Croson*, 488 U.S. 469, unless racial classifications are "reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility." *Id.* at 493. As explained by the dissent in *Metro Broadcasting*, 497 U.S. 547, later vindicated by this Court in *Adarand*, 515 U.S. 200, "[m]odern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination." *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting).

It is a noble endeavor to help disadvantaged individuals *regardless* of race—and that is what local government bodies and universities should do. However, *amici* submit that government bodies should never (outside of a remedial setting) be allowed to classify individuals by race for unequal burden in student admissions. "Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U. S.

630, 643 (1993) (internal quotes omitted). Thus, as this Court stated in *Adarand*, there really can be no "benign" racial classifications. "[A]ll governmental action based on race ... should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand*, 515 U.S. at 227 (emphasis added). While the Fourteenth Amendment protects individuals from racial discrimination, there is no countervailing principle that should subordinate individual rights to a university's perceived and arbitrary need for some ethnic mix constituting "diversity."

This Court has wisely cautioned against upholding race-conscious programs that are "ageless in their reach into the past, and timeless in their ability to affect the future." *Croson*, 488 U.S. at 498 (internal quotation marks omitted) (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986)); *see also Adarand*, 515 U.S. at 238. Indeed, in *Grutter*, the Sixth Circuit correctly acknowledged that, at the University of Michigan Law School, the University's use of race would continue indefinitely, because "[u]nlike a remedial interest, an interest in academic diversity does not have a self-contained stopping point." *Grutter v. Bollinger*, 288 F.3d 732, 751-52 (6th Cir. 2002). That is exactly the problem with the UT program. So long as it can use "diversity" as a goal justifying the use of race, the University will be able to justify its further use of race whatever the racial mix of its student body, and there will never be an end.

Accordingly, this Court should revisit and overrule its holding in *Grutter*, so as to prevent the confusion and weakening of equal protection demon-

strated by the years of litigation and tortuous procedure of the instant case.

CONCLUSION

For the foregoing reasons, the Court should find the UT admission program to be unconstitutional. This Court should also revisit its holding in *Grutter*, to make clear that outside of a constitutionally-permissible remedy to prior discrimination, race may not be considered in college admissions.

Respectfully submitted,

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